

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 2, 2007¹

DANNY R. KING v. TENNESSEE BOARD OF PAROLES

Appeal from the Chancery Court for Davidson County
No. 05-114-II Carol L. McCoy, Chancellor

No. M2005-02821-COA-R3-CV - Filed on May 29, 2007

Danny R. King (“Plaintiff”) committed the offenses of aggravated kidnapping and aggravated rape in 1981 and was sentenced to two concurrent life sentences. Plaintiff first became eligible for parole in 2004. The Tennessee Board of Paroles (the “Board”) denied parole. After unsuccessfully appealing the parole denial administratively, Plaintiff filed a petition for writ of certiorari with the Trial Court. Plaintiff’s primary argument is his claim that the Board improperly applied a version of the statute governing parole of sex offenders which was amended after he committed the crimes. Plaintiff claims the version of the statute as it existed when he committed the crimes should have been applied and application of the statute as amended resulted in an ex post facto violation. The Trial Court determined there was no ex post facto violation and dismissed the petition. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Danny R. King, *pro se* Appellant.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Bradley W. Flippin, Assistant Attorney General, Nashville, Tennessee, for the Appellee, Tennessee Board of Paroles.

¹ This appeal was assigned to this panel on April 2, 2007.

OPINION

Background

Plaintiff is currently an inmate at the Riverbend Maximum Security Institution in Nashville. In November of 1981, Plaintiff committed the offenses of aggravated kidnapping and aggravated rape. Following a jury trial in which he was convicted of both offenses, Plaintiff was sentenced to two life sentences to be served concurrently.

Plaintiff had a parole hearing in August of 2004. Following the hearing, Plaintiff received a notification from the Board stating:

As you are aware, on August 19, 2004, you ... came before Board Members ... for a parole grant hearing. We conducted a full hearing and stated to [you and your family members] that because you are serving a sentence for a sex offense, the law requires that you meet a higher standard than other inmates not serving a sentence as a sex offender.

It was stated to you that your [case does] not meet the standard required by statute for release on parole. However, we were not sure whether you had been evaluated under the correct statute that governs your sex offense. Therefore, [the three Board Members] voted to continue your [case] until November 2004, to inquire as to whether you had been given a psychological evaluation under the correct standard. We were recently advised that you were evaluated under the correct standard, which is standard IV. Before the Board can parole you, the law requires that a mental health professional must certify that you do not pose the likelihood of committing sexual assaults upon release from confinement. Again, as stated to you during the hearing, you do not meet that statutory condition.

The three votes to continue your case was not a final decision. Your case requires four concurring votes of Board Members, before a final decision is rendered. Your files have been forwarded to other members of the Board for their vote. Once we have four concurring votes, you will be notified of the Boards (sic) final decision.

Plaintiff later received notification that he was denied parole. The stated basis for denying parole was the "Seriousness Of Offense." Plaintiff's next parole hearing was scheduled for August 2006.

Plaintiff timely appealed the denial of parole through the Board's administrative procedures. Plaintiff's appeal was denied.

This litigation began in January of 2005 when Plaintiff filed a petition for writ of certiorari with the Trial Court. The primary crux of Plaintiff's petition was his claim that the Board applied the incorrect statute governing parole of sex offenders. Plaintiff claimed the Board applied a more restrictive statute which had been passed well after he was incarcerated. According to Plaintiff, the statute in effect at the time he committed the crimes was Tenn. Code Ann. § 40-3613 (1975) which provided:

The board of pardons and paroles shall have power to cause to be released on parole and person sentenced to confinement in the penitentiary who has served the minimum term provided by law for the offense committed by him, less good time; provided further, that no person convicted of a sex crime as defined in § 33-1301 shall be paroled unless the department of mental health, after an examination of such person, certifies to the board of pardons and paroles *that he could be released with safety to the public.* (emphasis added)

Plaintiff claimed that when he was considered for parole, the Board did not consider the above statute as it existed when he committed the crimes, but rather the Board considered the statutory version now in effect after the statute had been amended several times after his conviction. The current version of the statute is found at Tenn. Code Ann. § 40-28-116(a)(2) which provides:

No person convicted of a sex crime shall be released on parole unless a psychiatrist or licensed psychologist designated as a health service provider has evaluated the inmate and determined to a reasonable medical or psychological certainty that the inmate *does not pose the likelihood of committing sexual assaults upon release from confinement.* The evaluations shall be provided by psychiatrists or licensed psychologists designated as health service providers whose services are contracted for and funded by the board. (emphasis added)

that: The Board filed a motion to dismiss Plaintiff's petition claiming, among other things,

The rule changes discussed in the petition are procedural only and do not implicate *ex post fact[o]* violations according to *Miller v. Tennessee Bd. of Probation and Paroles*, 119 S.W.3d 696, 700 (Tenn. Ct. App. 2003). Even if the changes might raise *ex post facto* issues, the petitioner has failed to state a claim that he was disadvantaged as a result of any of the changes. The petitioner has failed to state a

claim for any alleged due process violations because he was not entitled to due process at his parole hearing. Additionally, the Board properly denied his release on parole based on the seriousness of the offense.

Therefore, the writ should not issue and this action should be dismissed....

In November of 2005, the Trial Court entered an Order granting the Board's motion to dismiss. The Trial Court stated in part as follows, with the footnote being in the original:

[T]he Petitioner argues that the law in effect at the time of his offense, Tenn. Code Ann. § 40-3613 ... provided that the Board of Paroles could release a person convicted of a sex crime once the Department of Mental health certified that this person could be released "with safety to the public." Tenn. Code Ann. § 40-3613. The Petitioner contends that this statute sets up an easier hurdle in the parole process than does Tenn. Code Ann. § 40-28-116.² He argues that the Board has engaged in an *ex post facto* violation of his rights by operating under the newer statutes and rules named above.

* * *

Actions which extend parole eligibility by altering the criteria for such eligibility can implicate the *ex post facto* clause, because eligibility for parole is part of the law annexed to the crime when it is committed. *Kaylor v. Bradley*, 912 S.W.2d 728, 732 (Tenn. Ct. App. 1995). In the present case, the Petitioner's eligibility for parole is not at issue. The challenged statutes have no effect on his eligibility, but only upon the procedures by which the State decides whether he should be granted parole. "Even if a law operates to the defendant's detriment, the *ex post facto* prohibition does not restrict 'legislative control of remedies and modes of procedure which do not affect matters of substance.'" *Miller v. Florida*, 482 U.S. 423, 433, 107 S.Ct. 2446, 2452, 96 L.Ed.2d 351 (1987).

² The [Board] contends that this interpretation of the statutes is counterintuitive, since the subgroup "[c]an be released with safety to the public" is necessarily more all-encompassing and harder to prove than certifying that a person "does not pose the likelihood of committing sexual assaults upon release from confinement." The author of [Attorney General] Opinion No. 90-10 appears to agree with this assessment, stating that "[the] new standard appears to be legally less restrictive in that the mental expert need only certify that the inmate is not likely to commit sexual assaults upon release from confinement, whereas under the old standard, the expert had to certify that the inmate could be released with safety to the public." The opinion does go on to state, however, that "[i]n any case in which the new standard constitutes a more restrictive guideline, the inmate must have the benefit of the old legislation."

Even if the contested statutes are deemed more than just procedural changes, Tennessee Courts have held that the application of a newer statute, rule or policy to an inmate's parole effort

will be deemed to increase punishment if it effectively postpones a prisoner's initial release eligibility date. To prevail with an *ex post facto* claim, a prisoner must show more than a speculative or attenuated possibility that the new statute, rule or policy may result in more time in prison. Rather, a prisoner must show that, as applied to his or her own sentence, the retroactive application of the new statute, rule or policy either will result in a longer period of incarceration or creates a significant risk of increasing the period of his or her incarceration.

Utley v. Tennessee Department of Correction, 118 S.W.3d 705, 717 (Tenn. Ct. App. 2003)(citations omitted). Furthermore, "if it can be considered highly speculative that the petitioner would be released earlier because of the application of the prior rule ... , then the use of the later rule would not violate the *ex post facto* prohibition." *Jordan v. Tennessee Board of Paroles*, No. 01-A-01-9607-CH-00347, 1997 WL 13756, at *3 (Tenn. Ct. App. January 16, 1997).

In the present case, the Petitioner has not made a persuasive argument that he would have been granted parole had Tenn. Code Ann. § 40-3613 been applied to his parole effort instead of Tenn. Code Ann. § 40-28-116 or Tenn. Code Ann. § 40-35-503(c). Accordingly, the Court finds his claim of an *ex post facto* violation to be too speculative to withstand the Respondent's motion to dismiss.

The Trial Court also concluded that Plaintiff did not have a due process right of entitlement to parole before the expiration of his sentence. The Trial Court then determined that all of Plaintiff's remaining arguments were equally without merit, that the Board's motion to dismiss was well taken, and that the case should be dismissed.

Plaintiff appeals, claiming generally that the Trial Court erred when it dismissed his petition. Plaintiff raises the same arguments that were raised before the Trial Court, i.e., that he was denied due process and that the Board's application of Tenn. Code Ann. § 40-28-116 violated the constitutional prohibition on *ex post facto* laws.

Discussion

The applicable standard of review in this type of case was set forth in *Jackson v. Tennessee Dep't of Correction*, No. W2005-02240-COA-R3-CV, 2006 WL 1547859 (Tenn. Ct. App. June 8, 2006), *no appl. perm. appeal filed*. In *Jackson*, we observed:

The common-law writ of certiorari serves as the proper procedural vehicle through which prisoners may seek review of decisions by prison disciplinary boards, parole eligibility review boards, and other similar administrative tribunals. See *Rhoden v. State Dep't of Corr.*, 984 S.W.2d 955, 956 (Tenn. Ct. App. 1998) (citing *Bishop v. Conley*, 894 S.W.2d 294 (Tenn. Crim. App. 1994)). By granting the writ, the reviewing court orders the lower tribunal to file its record so that the court can determine whether the petitioner is entitled to relief. Review under a writ of certiorari is limited to whether the inferior board or tribunal exceeded its jurisdiction or acted illegally, arbitrarily, or fraudulently. *McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990). The reviewing court does not weigh the evidence, but must uphold the board's decision if the board acted within its jurisdiction, did not act illegally or arbitrarily or fraudulently, and if there is any material evidence to support the board's findings. *Watts v. Civil Serv. Bd. of Columbia*, 606 S.W.2d 274, 276-77 (Tenn. 1980); *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983). These determinations are issues of law. *Watts*, 606 S.W.2d at 277....

Jackson, 2006 WL 1547859, at *3.

In *State v. Ricci*, 914 S.W.2d 475 (Tenn. 1996), our Supreme Court set forth the criteria for established an ex post facto violation. According to the Court:

An ex post facto law contains two critical elements. *State v. Pearson*, 858 S.W.2d 879, 882 (Tenn. 1993). First, the law must apply to events occurring before its enactment; second, it must disadvantage the offender affected by it. *Id.* at 882 (quoting *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987)).

Ricci, 914 S.W.2d at 480.

The question thus presented is whether application of Tenn. Code Ann. § 40-28-116, as amended after Plaintiff committed the crimes, was disadvantageous to Plaintiff. The Tennessee Attorney General was confronted with this very issue when posed with the following question: “Whether T.C.A. §§ 40-28-116(a) and 40-35-503(c) as amended in 1989 apply to those convicted

prior to November 1, 1989?” See Tenn. Op. Atty. Gen. No. 90-10, 1990 WL 513008 (Jan. 29, 1990). With regard to prisoners who committed sexual offenses prior to July of 1982, which includes Plaintiff, the Attorney General concluded as follows:

These inmates should be governed by § 40-28-116(a) as amended. Under that section, such inmates shall not be released on parole unless a psychiatrist or licensed clinical psychologist contracted for or funded by the State has evaluated such an inmate and determined to a reasonable medical or psychological certainty that the inmate does not pose the likelihood of committing sexual assaults upon release from confinement. Prior to this amendment, these inmates could not be released unless a proper mental health expert certified that they could be released with safety to the public. This new standard appears to be legally less restrictive in that the mental expert need only certify that the inmate is not likely to commit sexual assaults upon release from confinement, whereas under the old standard, the expert had to certify that the inmate could be released with safety to the public. In any case in which the new standard constitutes a more restrictive guideline, the inmate must have the benefit of the old legislation.

In Miller v. State, 584 S.W.2d 758, 761 (Tenn. 1979), the Tennessee Supreme Court construed the State's constitutional ex post facto provision as being broad enough to proscribe the application of a statute fixing punishment in excess of that provided by law in effect at the time of the commission of an offense. In Miller, at 761, the Court adopted the five classifications of ex post facto laws set forth by the New Jersey Supreme Court in State v. Rowe, 116 N.J.L. 48, 181 A. 706 (1935). Those classifications of ex post facto laws included every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage. Therefore, to the extent that application of T.C.A. § 40-28-116(a), alters the parole situation of the inmate to his disadvantage, such inmate has the option of applying the old release with safety to the public standard. Accordingly, in order to prevent any unconstitutional ex post facto application, any inmate committing a sex offense prior to July 1, 1982, may be released on parole provided such inmate meets either the old standard of § 40-28-116(a) or the 1989 standard of that provision.

Tenn. Op. Atty. Gen. No. 90-10, 1990 WL 513008 (Jan. 29, 1990).

Returning to the present case, the Trial Court correctly noted that in *Utley v. Tennessee Dep't of Correction*, 118 S.W.3d 705 (Tenn. Ct. App. 2003), this Court stated:

To prevail with an ex post facto claim, a prisoner must show more than a speculative or attenuated possibility that the new statute, rule, or policy may result in more time in prison. *California Dep't of Corr. v. Morales*, 514 U.S. at 509, 115 S.Ct. at 1603; *Wilson v. State*, 980 S.W.2d 196, 199-200 (Tenn. Ct. App. 1998). Rather, a prisoner must show that, as applied to his or her own sentence, the retroactive application of the new statute, rule, or policy either will result in a longer period of incarceration or creates a significant risk of increasing the period of his or her incarceration. *Garner v. Jones*, 529 U.S. at 251, 255, 120 S.Ct. at 1368, 1370, *California Dep't of Corr. v. Morales*, 514 U.S. at 509, 115 S.Ct. at 1603; *Weaver v. Graham*, 450 U.S. at 33, 101 S.Ct. at 967.

Utley v. Tennessee Dep't of Correction, 118 S.W.3d at 717.

Plaintiff has not demonstrated that application of the amended statute will in any way effectively postpone his initial release date. Moreover, Plaintiff's claim that application of the amended statute will postpone his release date is nothing more than pure speculation. We agree with the Tennessee Attorney General and the Trial Court that the amended statute is less restrictive than the statute in effect at the time Plaintiff committed the aggravated rape in 1981. Therefore, there was no impermissible ex post facto violation.

Plaintiff's due process claim is equally without merit. Plaintiff claims that he had a due process right in being paroled pursuant to language contained in Board Rule 1100-1-1-.06 as it existed prior to its amendment in 1985. The United States Court of Appeals for the Sixth Circuit expressly rejected the identical argument in *Wright v. Trammel*, 810 F.2d 589 (6th Cir. 1987), and we agree with that court's reasoning and its holding on this issue.

We have reviewed Plaintiff's brief and the record in detail. The Trial Court gave thorough consideration to all of Plaintiff's various issues surrounding his denial of parole. There is nothing in the record to suggest that the Board exceeded its jurisdiction or acted illegally, arbitrarily, or fraudulently. See *Jackson*, 2006 WL 1547859, at *3. Likewise, there is ample material evidence to support the Board's findings. The Trial Court, therefore, properly dismissed the petition.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Danny R. King.

D. MICHAEL SWINEY, JUDGE